Filed 12/23/08 In re Compton CA2/4

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

In re JAMES COMPTON, on Habeas Corpus.	B204169 (Los Angeles County Super. Ct. No. TA051747)

PETITION for Writ of Habeas Corpus. Gary R. Hahn, Judge. Writ granted in part.

James Compton, in pro. per.; and Anthony J. Dain, under appointment by the Court of Appeal, for Petitioner.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Assistant Attorney General, Paul M. Roadarmel, Jr., Stephanie C. Brenan and Theresa A. Patterson, Deputy Attorneys General, for Respondent.

In this petition for writ of habeas corpus, James Compton asks that we direct the superior court to amend the abstract of judgment to reflect a 2002 order striking the minimum parole eligibility term imposed pursuant to Penal Code section 186.22, subdivision (b)(4).[1] We grant the petition insofar as it requests amendment of the abstract of judgment. In all other respects, the petition is denied.

FACTUAL AND PROCEDURAL SUMMARY

On July 1, 1999, a jury convicted petitioner of two counts of attempted willful, deliberate, premeditated murder (§§ 664/187, subd. (a)) and two counts of assault with a firearm (§ 245, subd. (a)(2)). The jury found true the allegation that a principal was armed and personally and intentionally discharged a firearm (§§ 12022, subd. (a)(1), 12022.53, subds. (d) & (e)(1)). The jury found that petitioner's codefendant personally and intentionally discharged a firearm causing great bodily injury (§ 12022.53, subd. (d)). The jury also found true the allegation that the offenses were committed for the benefit of a criminal street gang (§ 186.22, subd. (b)(1)). The court found that petitioner had suffered a prior serious felony conviction (§ 667, subd. (a)).

The first abstract of judgment was filed on August 18, 1999. It stated, "As to counts 7 and 9 [attempted murder], the defendant is sentenced to life with the possibility of parole. As to the allegations pursuant to 186.22(b)(1) the defendant is sentenced to 15 years concurrent. As to the allegations pursuant to 12022.53(d) the defendant is sentenced to 25 years to life to run consecutive to life with the possibility of parole. The defendant is given 5 years pursuant to 667(a). Counts 8 and 10 [assault with a firearm] are stayed."

Petitioner appealed his conviction, which this court reversed as to counts 9 and 10. (*People v. Donaldson* (June 21, 2001, B134764) [nonpub. opn.].) We modified the judgment to clarify that the 15-year concurrent sentence imposed pursuant to section 186.22 was not an enhancement, but a minimum term (§ 186.22, subd. (b)(4)),

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[1] All further undesignated statutory references are to the Penal Code.

and that the minimum term should be doubled to 30 years as a second strike offense (§ 667, subd. (e)(1)). We also imposed a mandatory suspended parole revocation fine of $1,000. The trial court was directed to send a corrected abstract of judgment to the Department of Corrections and Rehabilitation.

On May 29, 2002, the trial court issued a minute order directing the judgment desk "to prepare a new abstract reflecting the new sentence as to count 7. [¶] By deleting: As to count 7. The defendant is sentenced to life with the possibility of parole. [¶] By adding: As to count 7. The defendant is sentenced to 15 years pursuant to 186.22 (b)(4) plus 15 years pursuant to 667 (e)(1) for a total of 30 years." No abstract of judgment reflecting these changes has been located.

On September 24, 2002, in response to a petition for writ of habeas corpus, the trial court issued an order to show cause "as to why the gang allegation whould [*sic*] not be stricken pursuant to 'People v. Salas' 89 Cal App 4th 1275." The district attorney did not oppose the petition. On October 25, 2002, the trial court issued a minute order stating, "The court . . . orders the Penal Code section 186.22 allegation be stricken on counts 7 and 8. This reverses the 15 year minimum parole eligibility date. The rest of the judgment remains the same." Again, no abstract of judgment reflecting these changes has been located.

On February 1, 2005, in a petition for writ of habeas corpus, petitioner challenged the sufficiency of the evidence to support his conviction. The petition was denied, but the trial court apparently realized that no abstract of judgment reflecting the Court of Appeal's 2001 decision had been produced and again ordered an amended abstract of judgment. The order read, "The court orders an abstract showing counts 9 and 10 reversed. And dismissed. [¶] Count 7 sentence is increased to 30 years to life. 15 years to life plus 15 years pursuant to Penal Code section 186.22 (b). [¶] Defendant is ordered to pay $1000.00 pursuant to Penal Code section 1202.4. [¶] Defendant is ordered to pay $1000.00 pursuan[t] to Penal Code section 1202.45." On March 11, 2005, the trial court issued an order amending the February 24 order as follows: "By deleting: 15 years to life plus 15 years pursuant to Penal Code section 186.22 (b). [¶] By adding: 15 years to

life pursuant to 186.22 (b) plus 15 years pursuant to 667 (e)(1) for a total of 30 years to life." Both the February 24 order and the March 11 order overlooked the fact that the minimum term imposed by section 186.22 had been stricken in 2002.

An amended abstract of judgment was filed March 16, 2005. In accordance with the trial court's March 11 order, it included a 15-year enhancement pursuant to section 186.22, subdivision (b)(4) and another 15-year enhancement pursuant to section 667, subdivision (e)(1). Upon a court order, a second amended abstract of judgment was filed October 26, 2006. This amendment clarified that the 25-year-to-life enhancement, imposed pursuant to section 12022.53, subdivision (d), applied to the attempted murder count rather than the assault with a firearm count.

On March 21, 2007, the trial court issued an order stating, "Please change the abstract as reflected on May 29, 2002, and ordered on June 11, 2002." Then, on April 18, 2007, the trial court ordered the abstract of judgment changed as follows: "As to count 7, 15 years to life for attempted [murder], plus an additional 25 years to life [for] P.C. 12022[.]53(d). [¶] The minimum term for parole is 30 years pursuant to 186.22(b)(4)."

A third amended abstract of judgment was filed on April 27, 2007. This is the most recent abstract that either party has been able to locate. This abstract shows petitioner's sentence as 15 years to life on count 7, plus an enhancement of 25 years to life pursuant to section 12022.53, subdivision (d). Under "other orders" is a comment stating, "The minimum term for parole is 30 years pursuant to PC 186.22(b)(4)."

On June 22, 2007, petitioner filed a petition for writ of habeas corpus. One of the grounds for his petition was the failure of the abstract of judgment to accurately reflect that the minimum term imposed under section 186.22 had been stricken in 2002. The trial court denied the petition in its entirety.

On September 19, 2007, petitioner filed another petition for writ of habeas corpus. The only issue he raised in this petition was sentencing error due to "inadvertence & clerical error by the judgment desk." He argued that the abstract of judgment did not reflect the trial court's October 25, 2002, decision that the minimum term under section 186.22, subdivision (b), should be stricken. The trial court denied the petition, saying,

"This court has already ordered the abstract of judgment be corrected according to the Court Of Appeals [*sic*] judgment."

On December 6, 2007, petitioner filed the present petition for writ of habeas corpus, raising essentially the same argument he raised in the September 19, 2007 petition. We issued an order to show cause and appointed counsel.

DISCUSSION

We conclude there are clerical errors in the abstract of judgment which warrant correction. "'It is not open to question that a court has the inherent power to correct clerical errors in its records so as to make these records reflect the true facts.' . . . Courts may correct clerical errors at any time." (*People v. Mitchell* (2001) 26 Cal.4th 181, 185.) An abstract of judgment that does not accurately reflect the trial court's pronouncement is a clerical error subject to correction. (*Ibid*.) There are multiple errors on the fourth amended abstract of judgment. Respondent and counsel for petitioner appear to be in agreement as to the necessary amendments.[2]

As pointed out by petitioner, the minimum term for parole eligibility is incorrect. In 2002, the trial court ordered that the minimum term imposed pursuant to section 186.22 be stricken in light of *People v. Salas* (2001) 89 Cal.App.4th 1275. *Salas* construed section 12022.53, subdivision (e)(2), to require that a section 186.22 gang enhancement be stricken if a firearm enhancement was imposed under section 12022.53, subdivision (e), but the defendant had not personally used a firearm.[3] (*Salas*, at p. 1282.)

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[2] Prior to appointment of counsel, petitioner argued on his own behalf that the maximum total sentence that could be imposed was 15 or 10 years. Petitioner is mistaken; his counsel has not pursued this argument.

[3] We recognize that recent cases instruct a trial court to stay, rather than strike, the section 186.22 enhancement in this situation, unless the discretion to strike is exercised in the "interests of justice" (§ 186.22, subd. (g)). (*People v. Gonzalez* (2008) 43 Cal.4th 1118; *People v. Sinclair* (2008) 166 Cal.App.4th 848.) These cases were decided long after the trial court's 2002 order became final, and respondent has not suggested that they have any bearing on the present petition.

No amended abstract of judgment was produced to reflect the court's 2002 order, and the most recent version of the abstract of judgment reads, "The minimum term for parole is 30 years pursuant to PC 186.22(b)(4)." This minimum term must be deleted in an amendment to the abstract. The correct minimum term is 14 years, arrived at by taking the seven-year minimum term for a prisoner sentenced to life (§ 3046, subd. (a)(1)) and doubling it pursuant to section 667, subdivision (e)(1), because petitioner has a prior serious felony conviction. (See *People v. Jefferson* (1999) 21 Cal.4th 86, 96.)

Other errors appear on the abstract of judgment, in addition to those raised by the petition. The sentence for count 7 is not 15 years to life, but rather, life with the possibility of parole. (§ 664, subd. (a).) Furthermore, the abstract of judgment fails to include an additional five-year term, pursuant to section 667, subdivision (a)(1). This mandatory enhancement appeared on all three prior versions of the abstract of judgment, and was apparently left off the most recent version through clerical error. Finally, the enhancement of 25 years to life should reflect that it was imposed pursuant to section 12022.53, subdivisions (d) and (e)(1), not just subdivision (d). This distinction is necessary in order to clarify that petitioner was not found to have personally used a firearm.

Petitioner's counsel has requested that the superior court be directed to provide counsel with a copy of the amended abstract of judgment after it is prepared. In light of the history of this case, the request is granted.

Petitioner raises a claim that the trial court's failure to correct the errors on the abstract of judgment deprived him of his constitutional rights to petition (U.S. Const., 1st Amend.) and to due process and equal protection (U.S. Const., 14th Amend.). His theory appears to be that the trial court acted out of personal bias. Petitioner has failed to present any evidence suggesting that the errors on the abstract of judgment were the result of deliberate action, rather than inadvertence. He is not entitled to relief on this claim. (See *People v. Duvall* (1995) 9 Cal.4th 464, 474 ["'Conclusory allegations made without any explanation of the basis for the allegations do not warrant relief'"].)

DISPOSITION

The petition for writ of habeas corpus is granted in part. Let a writ of habeas corpus issue directing the superior court to prepare and file an abstract of judgment amended as follows: delete the sentence of 15 years to life for count 7; add a sentence of life with the possibility of parole for count 7; delete the notation that the minimum term is 30 years pursuant to section 186.22, subdivision (b)(4); add a notation that the minimum term is 14 years pursuant to sections 3046, subdivision (a)(1), and 667, subdivision (e)(1); add a five-year enhancement pursuant to section 667, subdivision (a)(1); amend the enhancement of 25 years to life to show it was imposed pursuant to section 12022.53, subdivisions (d) and (e)(1). Copies of the amended abstract shall be forwarded to the Department of Corrections and Rehabilitation and to counsel for both petitioner and respondent.

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EPSTEIN, P. J.

We concur:

MANELLA, J.

SUZUKAWA, J.